United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

965

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,798

UNITED STATES OF AMERICA, Appellee,

v.

JOHN MOORE, Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLANT

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Authorities Cited

Issues Presented[1/]

1. Whether the admission in a robbery prosecution of evidence seized in a search made without a warrant was, in the circumstances, a violation of defendant's right under the Fourth Amendment to be free of unreasonable searches and seizures.

2. Whether the defendant's arrest during a police roundup based on a broadcast description was lacking in probable cause, so that testimony as to his confrontation with the victim during such roundup should have been suppressed.

3. Whether in the circumstances the District Court erred in ruling that if defendant testified, the government might offer evidence of a prior conviction, with the consequence that defendant felt compelled to forego his only defense.

1/ This case has not previously been before the Court.

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References to Rulings

There were no opinions, memorandums, findings, or conclusions below. Trial rulings in issue are at 70-71 and 94 of the reporter's transcript of the testimony.

Statement of the Case

Moore appeals from his conviction, after a trial by jury before Judge Sirica, of armed robbery, assault with a dangerous weapon, and carrying a dangerous weapon without a license, in violation of D. C. Code §§ 22-2901, 22-502, and 22-3204.

The proceedings arose out of the holdup, at about 10:30 p.m. February 23, 1969, of High's Dairy Store in a shopping center at 3847 Pennsylvania Avenue, S. E., in the District of Columbia. A clerk, Yates, was forced, according to his testimony, to hand over about $51 from the cash register. Yates notified the police, who broadcast a description, on the basis of which three or four men, including Moore, were arrested or "picked up" and were taken by the police to the High's Store, where Moore was accused by Yates, who also identified him at the trial. There were received in evidence (inter alia) a pair of sun glasses (Gov't Ex. 1) said to have been worn by Moore, and $51.34 in currency and coins (Gov't Ex. 3), both seized by the police in the search of an automobile within half an hour of the holdup.

Moore offered no evidence in his defense. He refrained from testifying--although his testimony if believed would have exculpated him--after the District Court ruled that if he testified the government would be permitted to introduce, by way of impeachment, evidence that he had been convicted of personating the owner of a government check.

Moore raises three issues as to the admissibility of crucial evidence at the trial, two concerning the violation of his constitutional rights and the third eliminating his only defense. First, the introduction of the sun glasses and money resulted from an unreasonable search and seizure in violation of his rights under the Fourth Amendment. Second, testimony describing Yates's on-the-scene confrontation

of Moore and Yates's identification of Moore at the trial should have been suppressed because they were the product of an arrest without probable cause. Third, the court below was unduly stringent in applying the rule in Luck v. United States, 121 U.S.App. D.C. 151, 348 F.2d 763 (1965), and Gordon v. United States, 127 U.S.App. D.C. 343, 383 F.2d 936 (1967), cert. denied, 390 U.S. 1029 (1968), permitting the government to impeach Moore by evidence of his prior conviction, with the result that Moore felt compelled to forego his only defense.

For clarity, the facts (with citations to the record) on which these contentions rest are stated hereinbelow in the argument as to the respective contentions. The record as to the search and seizure point being inadequately developed, appellant asks a remand for a hearing at which the facts may be developed, followed by a new trial if as is likely the facts so indicate. On each of the other two points he asks a new trial.

Argument

I. The Case Should Be Remanded for a Hearing in Which May Be Determined Whether the Search and Seizure of Which Moore Was the Victim Was Unconstitutional; If So, He Is Entitled to a New Trial, from Which Government's Exhibits 1 and 3 Must Be Excluded.

The Court is asked to read pages 65-69 of the reporter's transcript of the testimony.

A prominent feature of the government's case was the testimony of police officer Manjian (65-67).[2] In its entirety this was that between 10:30 and 11:00 o'clock on the evening of the holdup he "had occasion" to search a blue 1961 Chrysler automobile, in which he found a pair of sun glasses (exhibit 1) and $51.34 in currency and coins (exhibit 3) (65-66, 67). He said that the money had been in a brown paper bag (66); the bag was neither produced nor further described, nor was its absence explained. The glasses and the money were received in evidence without objection (69).

It is apparent that the search and seizure about which the officer testified were done without the authority of a warrant; the testimony refers to none, and the file of the case in the District Court contains no record of the issuance of a warrant.[3] Despite defendant's failure to object, there glares from the record the question whether these sun

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2/ Numerals refer to pages of the transcript of the testimony.

3/ Moreover, if there were a warrant, it would have been invalid as not supported by probable cause to issue it. See footnote 6, p. 6 .

glasses and this money were the product of an unreasonable search and seizure. If so, the exhibits were of course inadmissible.4/ Section (a) of this portion of this brief shows that the search was unreasonable. Section (b) shows why the Court should notice the issue as plain error and a defect affecting substantial rights. Section (c) indicates the procedural steps that appellant asks the Court to take to remedy the error.

A. No Justification Appears for the Search and Seizure

The striking feature of Officer Kanjian's testimony is the absence of anything in it--or elsewhere in the record--connecting his search with any other event in the case. Consequently, the record contains not a scintilla of justification for his search.

There was evidence that before the robbery Yates noticed a car (5, 9, 10-12); that about the time of the robbery Moore was seen to enter a car near the shopping center (31, 32, 33); and that soon afterward a car spun out of control or pulled sharply to the curb a few blocks away and ran up on the sidewalk (41, 47-48). These cars may well have been one and the same; perhaps the District Court could validly have so found. But none of them was connected, either by Kanjian's testimony or by any other evidence, with the car that Kanjian searched.

4/ Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

The record does not inform us of the place of Kanjian's search; if a spatial relation existed between that search and the other evidence, we do not know what the relation is.

Similarly, the record shows no causal connection between Kanjian's acts and those of the other actors mentioned. Although there was evidence that a policeman made a radio broadcast about a car containing a man later identified as Moore (31-32), there is no evidence that Kanjian received that broadcast, that he was aware that a crime had occurred, that Moore was implicated in it, or that anyone was being pursued or arrested.5/

To point out these defects is not merely to assert a technical failure on the government's part to make connections that might readily have been made. Even if the government were now able to make a connection between Kanjian's search and the other evidence, there would remain a question whether valid grounds existed to search any car without a warrant, because the existing record precludes the usual grounds for upholding a warrantless search.6/

5/ The government apparently planned to offer evidence that the car searched was owned by one Irene Kelley, who the prosecutor said was Moore's mother, but it withdrew its offer of such evidence and made no attempt at such a showing (66-67). Clearly, such evidence, standing alone, would not establish probable cause to search the car, since it does not appear that Kanjian was aware of a crime, nor of Moore's alleged connection with it, much less such a connection on the part of Moore's mother.

6/ Indeed, even if we are mistaken as to the absence of a warrant, the utter lack of connection between the search that took place, on the one hand, and any crime, on the other, would require the conclusion that the supposed warrant was invalid and the search unconstitutional. Aguilar v. Texas, 378 U.S. 108 (1964).

Plainly, the search was not incidental to Moore's arrest, because he was arrested (Officer Kanjian taking no part) afoot after having been seen within and departing afoot from a restaurant, and no car was then nearer than 200 feet (49, 51, 57). In view of the stringent scope limitations which the Supreme Court has recently imposed upon searches incidental to arrests, no search of any automobile could here be justified on that ground. Vale v. Louisiana, 399 U.S. 30 (1970); Chimel v. California, 395 U.S. 752 (1969); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364 (1964); United States v. Marti, 421 F.2d 1263, 1270 (2d Cir.), cert. denied, 399 U.S. 913 (1970); cf. Terry v. Ohio, 392 U.S. 1 (1968).

Moreover, if we assume, as might be inferred, that all the cars mentioned in the evidence were one and the same,7/ then the search could not be otherwise justified. It could not have been an incident of a hot pursuit, because no one could seriously suggest that the police were searching that car for the robbers. By all accounts its occupants had fled afoot when Officer Maddox, leading the pursuit, came up to the car;

7/ If the cars were not one and the same, then the record is silent as to what became of all but the one abandoned on the sidewalk. There is no evidence of pursuit of any other car, and all have fallen through the cracks in the record. It is clear only that, when arrested, Moore was remote from all cars.

indeed, he did not bother to search it (41, 47-48). Nor can there be any suggestion that evidence was about to be removed or destroyed, for the car was deserted. For the same reason, it cannot be suggested that the car itself was about to be removed.

In short, on no hypothesis could the government establish, in view of the facts now of record, a pressing need to search the car that was left on the sidewalk when the occupants fled. In such circumstances the cases in point are Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), and Preston v. United States, 376 U.S. 364 (1964). In the Dyke case the Supreme Court held unconstitutional a search of the defendant's car made while it was parked outside a court house within which the defendants were under arrest, the Court emphasizing that the search was too remote in time and place to be incidental to an arrest. It also held that no probable cause existed to believe that evidence would be found in the car. Similarly in the Preston case, "[t]he search of the car was not undertaken until petitioner and his companion had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime. . . . Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction." (376 U.S. at 367).

The best the government could do--if the car on the sidewalk was the car searched--would be to rely on Chambers v. Maroney, 399 U.S. 42 (1970) and United States v. Free, ___ U.S.App. D.C. ___, ___ F.2d ___ (No. 23,221, decided August 12, 1970). These cases sustained warrantless searches of automobiles upon holdings by the Supreme Court and this Court that the opportunity to search was fleeting because the cars were immediately movable. In those circumstances, to pause to obtain a warrant would necessitate either letting the car get away or seizing it--thereby raising the same constitutional questions as would an immediate search.

But in both those cases, the danger that the automobile might be removed during a pause to obtain a warrant was clear and present, because the cars were occupied by suspects when the opportunity to search arose.[8/] They are on that ground sharply distinguishable from the present case. Here the car was abandoned, at least temporarily, and the police might readily have kept it under observation while sending for a warrant.

United States v. Collins, ___ U.S.App. D.C. ___, ___ F.2d ___ (No. 22,770, decided January 20, 1971), clearly indicates that the Chambers and Free cases do not automatically dispense with the requirement of a

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8/ So, too, in Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931); Scher v. United States, 305 U.S. 251 (1938); and Brinegar v. United States, 338 U.S. 160 (1949).

warrant for searches of automobiles;[9/] rather, their doctrine does not apply where the police have an opportunity to procure a warrant (slip opinion at 10-11). Although the Chambers case distinguished Dyke v. Taylor Implement Mfg. Co. on the ground that probable cause did not exist in the Dyke case, and distinguished Preston v. United States on the ground that the issue there was whether the search was incidental to an arrest, nevertheless neither the Chambers case nor the Free case holds that a car which, when the police arrive, has been deserted and apparently abandoned by its occupants may be searched without a warrant.

B. The Defect Affects Substantial Rights

In Kaufman v. United States, 394 U.S. 217 (1969), the Supreme Court held that the admission of evidence allegedly the fruit of an unreasonable search may be collaterally attacked under 28 U.S.C. § 2255 despite the absence of objection at trial. This ought to establish Moore's right to raise a like issue here, for to refuse on appeal to consider a point that would immediately be available on collateral attack would serve only to proliferate and complicate litigation.[9a/]

Moreover, in Solomon v. United States, 133 U.S.App. D.C. 103, 106, 408 F.2d 1306, 1309 (1969) this Court said:

9/ Indeed, the Supreme Court so conceded in its opinion in the Chambers case (399 U.S. at 50).

9a/ In United States v. White, ___ U.S.App. D.C. ___, 429 F.2d 213 (1970), the Court relegated appellant to the circuitous route. There, however, the known facts indicated the possible existence of other facts that would have justified the search on recognized authority. Here, the known facts indicate at worst a serious question whether the Chambers and Free cases should be broadened beyond their rationale.

> Rule 52(b), Fed.R.Crim.P., requires us to exercise our discretion whether to notice "[p]lain errors or defects affecting substantial rights" even when no objection is made at trial. Improper identification procedures may violate constitutional rights, and it is difficult for us to conclude that these rights are not "substantial". Further, we are reluctant to penalize defendants for the mistakes of their counsel . . . .

These considerations apply with full force to Moore's constitutional rights violated by the unreasonable search and seizure apparent on this record.

The evidence thus unconstitutionally admitted must have been devastating to Moore in the jury's eyes. Yates, the victim, swore that the glasses were those worn by the robber during the robbery (7, 14-15), and a police officer testified that he saw Moore enter a blue 1960 or 1961 Dodge or Chrysler automobile (31, 33). The glasses were found in the search of a blue 1961 Chrysler. This combination of facts must have placed the jury under a powerful compulsion to conjecture that the glasses worn by the robber had been found in a car occupied by Moore.

Similarly as to the money. Yates testified that he had, on the robber's orders, taken money from the cash register and placed it in a bag (5-15). The introduction of a like sum of money said to have been found in a bag in a car that the jury might have associated with Moore could hardly fail to induce conjecture that the stolen money had been in Moore's possession.

The District Court gave no limiting instruction to soften the impact of such conjecture. Since Yates was the only eye witness to the robbery, evidence such as the money and sun glasses, which the jury might regard as independent circumstantial proof of Moore's participation, went to the heart of the case.

The prejudice could only have been heightened by the probability that, even absent the unlawful search, the money and the glasses were inadmissible.[10/] This Court is well aware of Dean Wigmore's oft quoted reference to the "natural tendency to infer from the mere production of any material object, and without further evidence, the truth of

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10/ The only connection in the record between the money, on the one hand, and Moore or the robbery, on the other, were the references to the money's having been in a bag and the references to a blue 1960 or 1961 Dodge or Chrysler. Since the bag in which Yates placed the money was not described, since the bag in which Officer Kanjian found the money was neither produced nor accounted for, and since the number of blue 1960 or 1961 Dodges and Chryslers extant must be substantial, it is doubtful whether an adequate foundation was laid to show the relevancy of the money. Although the sun glasses were identified by Yates as having been worn by Moore, Yates based this identification entirely on the assertion that the glasses had been found in the car (14). This Yates could have known only from hearsay, not from personal knowledge; hence his identification of the glasses was inadmissible and could have been stricken on motion. Since he admitted that the glasses bore no identifying mark (15), it is incredible that Yates could have identified them from personal knowledge. Hence the glasses, too, were, strictly speaking, irrelevant. The irrelevancy of the exhibits, however, appears only upon deliberate scrutiny of the record. The effect on the jury must have been quite different.

all that is predicated of it." 4 Wigmore, Evidence §1157, at 254 (3d Ed. 1942). The remarks of the Sixth Circuit in Dean v. Hocker, 409 F.2d 319, 321 (1969), are in point and should be followed here:

> We deal here with real evidence. In 1877 Mr. C. J. Darling (later Justice Darling) posed this thought:
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> > "What is called 'real evidence'--mostly bullets, bad florins, and old boots--is of much value for securing attention. This is true even when these exhibits prove nothing,--as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to an English juryman just what a 'scarabaeus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs."

Perhaps Mr. Darling overstated the matter, but there still lurks in the cupboard of judicial thought the idea that physical objects do have an impact on jurors and that the judge, as a preliminary matter, should avoid that impact where the real evidence has little or no relevance.

Normally we do not find appellate courts affirming judgments because the physical evidence did not prove anything. The contrary is true. In many cases reversals were predicated in whole or in part on the admission of evidence not sufficiently identified. These reversals illustrate the general belief that physical evidence admitted does influence a jury, notwithstanding the lack of a satisfactory foundation.

C. The Court Should Remand for Further Hearing

As the record stands, two questions are unanswered. First, there is the question whether the government could, if given the opportunity, establish a connection between the search and the other evidence of record.[11/] Unless that connection is made, a new trial is necessary, from which government exhibits 1 and 3 will be excluded.

Second, if that connection could be made, the question will remain whether this case is controlled by the Chambers and Free cases or by the Dyke and Preston cases. That question, which is important for the future guidance of the police, should be decided only upon a full record as to the circumstances in which the search was made, as well as the occasion that gave rise to it. The Court will wish to know enough facts to enable it to evaluate whether the police should have sent for a warrant. If so, then, again, a new trial will be necessary.

In view of these questions, rather than a new trial on the search and seizure ground, appellant requests only a hearing at which the occasion for the search and the circumstances in which it was made may be shown. The Court has followed such a procedure in Frazier v. United

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11/ The lack of such a connection in the present record might be due to the lack of a timely objection to the admission of government exhibits 1 and 3.

States, 136 U.S.App. D.C. 180, 419 F.2d 1161 (1969),[12/] and Proctor v. United States, 131 U.S.App. D.C. 241, 404 F.2d 819 (1968), upon reversing convictions based on an unconstitutionally admitted confession despite the defendant's failure to raise the question clearly in the District Court. So, too, in Campbell v. United States, ___ U.S.App. D.C. ___, 429 F.2d 209 (1970), where the principal question was one of mere evidence, not at the constitutional level. And the Supreme Court has done likewise in reversing a state court's refusal, on grounds that the issue had been inadequately raised at trial, to consider the admissibility of evidence seized in an allegedly unreasonable search. Henry v. Mississippi, 379 U.S. 443 (1965). These precedents should be followed here.

12/ The Court said (136 U.S.App. D.C. at 188, 419 F.2d at 1169):

> because the Government had no clear warning that it would need to produce more evidence, we are reluctant to reverse for a new trial. . . . Absent some additional evidence . . . of understanding waiver, however, his confession cannot stand. Accordingly, we shall remand the record in this case to the District Court for an evidentiary hearing and findings of fact on the validity of appellant's purported waiver.

II. The District Court Erred in Admitting Identification Evidence That Was the Product of an Unlawful Arrest Without Probable Cause

The Court is asked to read pages 6, 9, 23, 47, 48, 49, 50, 51, 53, 56, 57, 59, 60, 70, 71, and 77 of the reporter's transcript.

The evidence concerning Moore's arrest and his confrontation with Yates were as follows:-

On direct examination on the government's case in chief Yates testified that shortly after the robbery the police brought back three suspects for Yates to identify (9). None was the robber (id.)[13/] While the last one was departing a patrol car brought Moore, whom Yates thereupon identified as the robber (id.) On cross-examination Yates said that at the time of the accusation Moore was wearing neither a trench coat nor sun glasses, features of Yates's earlier description of the robber to the police (23). At the trial Yates again identified Moore as the robber (6).

Police Officer Maddox testified that he heard a broadcast announcing the robbery and describing the robber (47).[14/] Soon he received another broadcast about a car that might contain the culprit (id.) Seeing a car

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13/ One of the men rounded up was shorter in stature than Moore and wore brown pants (21); Moore's pants were gray (53). Another had a "haircut," whereas Moore wore a large "bush" (20, 22).

14/ The description received by Maddox was "one male Negro, about 20 to 22 years, five feet ten inches, thin build, had an African bush haircut and tan trench coat, or light tan trench coat, and armed with a pistol" (49).

pull to the curb sharply he went there (id.) He saw no occupant of the car, no one getting out of it, and no one running away from it (50). A bystander, Cameron, informed him that two young Negro men had left the car, giving no further description (51). Maddox then set off on a search for these men, arriving by a circuitous route at the Hot Shoppe, where he saw a man (whom he identified at the trial as Moore) "that partially matched the description broadcast for the robber" (48, 51). Moore was wearing neither a trench coat nor sun glasses (53), and there is no evidence that he was armed. The officer approached Moore, who thereupon ran away (48-49). Maddox asked a nearby patrol car to stop Moore, which was done (49).

Police Officer Simmons testified that he received Maddox's request to intercept Moore (56-57). Simmons complied, placing Moore under arrest (57). There is no evidence that he was armed. Simmons then took Moore back to the scene of the robbery where he was accused by Yates (id.)

Moore testified outside the presence of the jury that while in the restaurant shortly before his arrest he saw the police across the street "pick up a dude," an employee of the restaurant (77). Ten minutes later the dude returned, and in answer to Moore's inquiry said that there had been a holdup in the shopping center "and he is picking up people" (id.) Soon thereafter Moore was arrested, handcuffed, and taken to the scene of the crime, where Yates identified him (78).

After the government rested, Moore moved to suppress the testimony on his identity as the robber (70). The judge denied the motion as too late (id.) Upon Moore's protest that he had not previously been aware of what the government's evidence would be, the judge said that if the motion had been timely, he would have ruled that the Wade, Stovall, and Gilbert[15/] cases do not apply to the facts and that he would have admitted the "in-court identification" (71).

A. Moore Was Arrested Without Probable Cause

The events described by the testimony amount to this. Purely on the basis of a description that--save for three salient features, a trench coat, sun glasses, and a gun--might have fit scores of men in the neighborhood, the police rounded up four and haled them before the robbery victim. At least three of them must necessarily have been innocent; and if Yates had not ended the game by choosing Moore, there is no telling how many more innocents would have got the same treatment. So far as appears, all who were rounded up may have fit the broadcast description. Moore did fit it "partially," in its generalities; but he lacked all three of its outstanding features, the coat, the glasses, and the gun.

15/ United States v. Wade, 388 U.S. 218 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967).

In these circumstances, Moore was arrested without probable cause--the clearest case of an unlawful "arrest for investigation."[16/] The police demonstrated by action louder than any words that investigation was their purpose, for their roundup of four men for a crime committed by a lone bandit proves that the description on which they acted was insufficient to enable them to identify any as the probable felon.

Ellis v. United States, 105 U.S.App. D.C. 86, 264 F.2d 372, cert. denied, 359 U.S. 998 (1959), and Bailey v. United States, 128 U.S.App. D.C. 354, 389 F.2d 305 (1967), show that an arrest made during a roundup of persons answering a general description is unlawful. In both cases, as we shall see, the Court took pains to point out that if, instead of going directly to the defendant, the police had rounded up innocent men, the descriptions would have been held less than probable cause for arrest.

The Ellis case is most instructive, the broadcast description there relied upon being closely comparable with that at bar. Ellis's arrest was upheld in a 2-1 decision which the majority regarded as presenting a close question, characterizing the appellant's argument as "strong" (105 U.S.App. D.C. at 87, 264 F.2d at 373). The police knew of a series of housebreakings in a particular location, following a unique pattern, and had several descriptions of the felon. For comparison, a composite of

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16/ Catlin v. United States, 117 U.S.App. D.C. 123, 326 F.2d 666 (1963).

those descriptions and that which, in the present case, Officer Maddox had of Yates's assailant are set forth in tabular form in the footnote.[17/]

Either of these descriptions might fit many men. Three things, however, indicate that had the facts at bar been before the Court when it decided the Ellis case, it would have held the arrest unlawful. First, when Ellis was arrested, he fairly fit the broadcast description in its totality: he was a brown skinned colored man, 22 to 25 years of age, five feet seven or eight inches tall, weighing 145 to 150 pounds, wearing a gray topcoat with a half-belt in the back and a brown hat, and very

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17/

	Ellis case	Present case
Sex	Man	Male
Race	Colored	Negro
Complexion	Brown skinned	Not stated
Age	Teens to 24	20-22
Height	5' 7" to 5' 8"	5' 10"
Weight	150	Not stated
Build	Not stated	Thin
Hair	Not stated	African bush
Dress	Gray or black topcoat, half-belt in back	Tan trench coat
Hat	Brown or gray	Not stated
Other	Very neatly dressed	Not stated
Weapons	Not stated	Pistol

neatly dressed. In contrast, by Maddox's admission, Moore fit the broadcast description only "partially." Among the aspects in which he did not fit were the trench coat, the pistol, and the sun glasses.[18/]

Second, Ellis's behavior, observed by the police before they approached him, lent probability to his being the felon. The Court said, "Here the basic elements of the various descriptions were similar, and fairly matched Ellis's appearance. This, coupled with Ellis's presence in the area at that time of day, the entry on the front porch and his behavior when confronted justified his apprehension." (105 U.S.App. D.C. at 88, 264 F.2d at 374). In the case at bar nothing occurred comparable to Ellis's "entry on the front porch." Moore was standing peaceably in a restaurant when Maddox began to approach him. Hence an important element, present in the Ellis case, of the total probability of Moore's being the culprit is lacking. We defer for a moment discussion of "his behavior when confronted."

Third--and decisive--in Ellis's case there was no roundup; here there was. As noted, one significance of the roundup is its inconsistency with a belief on the part of the police that Moore's description

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18/ Maddox's testimony does not mention that the broadcast description on which he acted referred to sun glasses. On the other hand, Yates testified positively that he mentioned the sun glasses to the police, and it is credible that Maddox's omission of that element was due to a failure of his memory between the arrest and the trial, rather than to its omission from the broadcast or to his forgetting it between the broadcast and the arrest.

or conduct were sufficient to identify him, or anyone else, as the probable felon.[19/] The controlling weight of this fact is demonstrated by the Court's going out of its way in the Ellis case to say (id.):

> Nor can vague and generalized descriptions justify "dragnet" round-ups of large numbers of persons who might fit such a description. Here, however, there was no such round-up; and the person arrested not only fitted the broadcast description but supplied other indicia through his conduct.

Again, in the Bailey case, where the police also acted on a general description, the Court took pains, in holding that the arrest was based on probable cause, to say, "And, most important, there is no suggestion of a round-up of innocent 'suspects' following the robbery." (128 U.S.App. D.C. 358, 389 F.2d at 309; emphasis added).

These observations are consistent only with the view that where the police round up a number of suspects who may or may not fit a broadcast description, of limited particularity, their fitting the description does not suffice as probable cause to arrest any of them. We can conceive no other reason why the Court should twice have made such observations.

19/ Another significance is that the roundup graphically illustrates the very thing that the requirement of probable cause is intended to prevent--police intrusion upon the persons of innocent citizens.

We now return to Ellis's and Moore's behavior upon being approached by the police. Ellis appeared nervous, dropping the contents of his pocket, and holding his arm peculiarly. Moore fled. In the Ellis case the Court relied on Ellis's behavior as lending probability to the cause for his arrest, for it evidenced consciousness of guilt. But a like inference would not be warranted in the present case. Again, the reason lies in the "drag net" operations of the police. Moore, it will be recalled, had just seen another man arrested and taken off to the scene of a robbery. In those circumstances, if Moore's flight evidenced fear, it may have been fear not of retribution but of indignity. And although such may be the motive in any case of flight, the distinguishing fact here is that Moore had seen before his eyes events that would lend credence to such a fear.

Those events, moreover, consisted of improper conduct by the police. This brings his flight squarely within the reasoning of Wong Sun v. United States, 371 U.S. 471 (1963), which held that an arrest predicated in part upon the defendant's flight from the arresting officer was lacking in probable cause. The ground of decision was that the police had provoked the flight by misrepresenting their mission (371 U.S. at 482-84):

> Agent Wong . . . misrepresented his mission at the outset. . . .
>
> Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion. . . .

> A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked.

So here, Moore's flight was "ambiguous conduct that the arresting officers themselves have provoked." Provoked, it might be added, by acts at least as reprehensible and frightening as the misrepresentation in Wong Sun v. United States.

Finally, if Moore's flight were equated with Ellis's behavior on the approach of the police, there would nevertheless remain in Moore's case the critical element which the Court indicated in the Ellis case, and again in the Bailey case, would if present have made those arrests unlawful--namely, the roundup of innocents on the basis of a general description. In light of that unsavory element, Moore's arrest must be held unlawful.

B. The Identification Evidence Should Be Suppressed

Evidence obtained during an unlawful arrest must be suppressed; and that is true not only of real evidence but of testimony, including testimony that a victim of a crime has identified the defendant as its perpetrator. See United States v. Greely, ___ U.S.App. D.C. ___, 425 F.2d 592 (1970), Washington v. United States, 134 U.S.App. D.C. 223, 414 F.2d 1119 (1969).[20/]

20/ Cf. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Wong Sun v. United States, 371 U.S. 471, 477 (1963).

Here there were two kinds of identification, known in current jargon as "in-court" and "out-of-court." Moore's motion to suppress was broad enough to cover both. Yates and Simmons described on the stand Yates's confrontation with Moore immediately after his arrest. This was the out-of-court identification. Since it could not have occurred but for the unlawful arrest, and since the testimony describing it was elicited by the government on direct examination on its case in chief, that testimony was inadmissible. Campbell v. United States, ___ U.S.App.D.C. ___, 429 F.2d 209 (1970); United States v. Greene, ___ U.S.App. D.C. ___, 429 F.2d 193 (1970); Clemons v. United States, 133 U.S.App. D.C. 27, 408 F.2d 1230, cert. denied, 394 U.S. 964 (1969).

There must, therefore, be a new trial. There will then arise the question of the admissibility of the "in-court" identification, that is, Yates's testimony that Moore was the man who robbed him. This seems to depend upon whether Yates's recollection of Moore as the alleged robber had an "independent source." Cf. Baker v. United States, 131 U.S.App. D.C. 7, 35, 401 F.2d 958, 986 (1968); United States v. Wade, supra; Gilbert v. California, supra; Stovall v. Denno, supra.

On Moore's motion to suppress, the judge made no finding as to whether or not the in-court identification had an independent source, and it is impossible to determine from the colloquy whether he viewed

the issue as being the existence or nonexistence of such a source.[21] Appellant therefore urges that upon remand the District Court be directed to rule before trial upon whether Yates's in-court identification had the requisite independent source.

III. The District Court Applied an Erroneous Standard in Deciding to Permit Impeachment by Evidence of Prior Crime

The Court is asked to read pages 72, 73, 74, 75, 76, 77, 78, 92, 93, 94, 96 and 97 of the reporter's transcript.

Upon resting, the government advised the judge that Moore had been convicted of personating the owner of a federal check and that if he elected to testify, the government would wish to prove the conviction (72-73). The judge then conducted an inquiry, as contemplated by the Luck and Gordon cases, on whether the conviction might be used. The inquiry consisted entirely of Moore's testimony outside the presence of the jury.

21/ The judge's ground for ruling the in-court identification admissible was that the Wade, Gilbert, and Stovall cases were inapplicable. Strictly speaking, this may be true, since those cases concerned the right to a lawyer under the Sixth Amendment and due process of law under the Fifth Amendment, whereas here we are concerned with an unlawful arrest in violation of the Fourth Amendment (the right of the public to be secure in their persons from unreasonable seizures (see, e.g., Henry v. United States, 361 U.S. 98 (1959)). But the "independent source" criterion applies to evidence obtained after the denial of Fourth Amendment rights as well as Fifth and Sixth Amendment rights. It is possible that by ruling the Wade, Gilbert, and Stovall cases inapplicable the judge meant to hold that the independent source criterion is inapplicable. If so, he was in error.

Moore gave the testimony that he would have given the jury (74-78). In substance it was that he and a companion had been in a car together. The companion left the car. When he returned with money, Moore learned that the companion had committed a robbery, Moore having had no previous inkling of his intention to do so. Upon seeing the police, the two drove away together and subsequently fled on foot, Moore in a panic lest he be thought to have abetted the crime.

After hearing the testimony the judge, quoting from and paraphrasing the Gordon case extensively, ruled that the government might prove the prior conviction, holding that Moore had not persuaded him otherwise (94). The reasons given by the judge were that the government's evidence, direct and circumstantial, seemed to him overwhelming; and, "After all the defendant isn't the only one that has certain rights in this courtroom or any court of law. The government has certain rights and I think they have a right to show the prior conviction under all the circumstances . . . ." (94).

After lengthy consideration Moore elected not to testify (96-97). He then rested (98).

Despite his extensive reference to the Gordon case, the judge's ruling gives no indication that he correctly applied the basic criterion of that case and the Luck case. Rather, the reasons that he gave for his ruling conflict with that criterion, as will now be shown.

The basic issue was stated thus in the Gordon case (127 U.S.App. D.C. at 346, 383 F.2d at 939):

> The defendant who has a criminal record may ask the court to weigh the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility.

This, the Court indicated, involves two distinct though related questions: first, whether the prior crime tends to reflect upon the defendant's testimonial veracity, and second, if so, whether it is more important for the jury to hear the defendant's testimony or the impeaching evidence if he testifies. Thus, the Court went on in the Gordon case (id. at 347, 383 F.2d at 940):

> Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.22/

22/ The Court continued with a footnote as follows (id.):

> This weighing process would occur only where it has been determined that the prior convictions are otherwise admissible. Having made that determination, the judge would then consider whether the defendant's testimony is so important that he should not be forced to elect between staying silent--risking prejudice due to the jury's going without one version of the facts--and testifying--risking prejudice through exposure of his criminal past.

Assuming for the argument that Moore's prior crime was relevant to his credibility,[23/] therefore, there would remain the question whether the importance of having the jury hear his testimony outweighed the importance of having the jury learn of his crime. On that question the pertinent factors militated heavily in favor of excluding the conviction:-

First, Moore was his only witness; without his testimony he had no defense.

Second, his testimony was fully exculpatory. He committed neither robbery nor assault, and his companion, not he, carried the weapon. Although, as he candidly admitted, he was an accessory after the fact,

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23/ The prior conviction was of violating 18 U.S.C. § 914, which provides:

> Whoever falsely personates any true and lawful holder of any share or sum in the public stocks or debt of the United States, or any person entitled to any annuity, dividend, pension, wages, or other debt due from the United States, and, under color of such false personation, transfers or endeavors to transfer such public stock or any part thereof, or receives or endeavors to receive the money of such true and lawful holder thereof, or the money of any person really entitled to receive such annuity, dividend, pension, wages, or other debt, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Although at first blush the element of false personation in this crime seems to bear heavily upon veracity, that is only partly correct. The statute may be violated by attempting to negotiate a check issued by the United States Treasury and belonging to another person. For assessing veracity this has perhaps as much probative weight as, say, larceny. Moore's conviction, moreover, was upon a plea of guilty; by so pleading he evidenced that he was not inclined to lie to the Court. See Gordon

(continued)

he was not an aider and abettor, for he learned of the offense only when his companion returned to the car. At that time the crimes charged were complete; hence Moore was not guilty of committing them. Cf. Bailey v. United States, 135 U.S.App. D.C. 95, 416 F.2d 1110 (1969).

Third, without his testimony, some facts helpful to his defense lose significance. His story is in a measure corroborated by evidence that two men fled from the car which pulled sharply to the sidewalk (41) and by the gun's not having been found. Unexplained by his testimony, however, these facts do not help him.

Fourth, proof of the prior offense was likely to be uniquely prejudicial in the eyes of a Washington jury. The crime, personating the owner of a Treasury check, would evoke more fear and revulsion in a jury of Washingtonians--who are most likely to have close acquaintance with government employees, pensioners or other regular recipients of such checks--than many other crimes.

Finally, since there was considerable evidence against Moore from several witnesses, both direct and circumstantial, credibility evidence would have been of marginal importance. In the Gordon case the Court held that in a close contest one might well conclude that all relevant

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23/ (continued)

v. United States, supra, 127 U.S.App. D.C. at 347 n. 8, 383 F.2d at 940 n. 8. But cf. United States v. Grimes, 137 U.S.App. D.C. 184, 421 F.2d 1119 (1969). To the extent that the question of the effect of the guilty plea on relevance for veracity is still open in this Court, Moore urges it.

evidence, however marginal, should be admitted.[24/] The implication is strong that where, as here, the impeaching evidence could have made but a negligible contribution, it should be excluded.

In ruling, the judge ignored the first four of these elements and turned the fifth inside out. He held that because the evidence against Moore was overwhelming, the value of impeachment evidence would outweigh the value of Moore's testimony. As just now noted, the Gordon case indicates the contrary. To deprive the defendant of his unfettered election whether or not to take the stand on the ground that the evidence against him is overwhelming is tantamount to reversing the presumption of innocence. It amounts to saying that because appearances are against the accused, it is important to pile on the prejudicial impeaching evidence and unimportant for the jury to hear his explanation or refutation of the case against him. In truth, where the incriminating evidence is strongest, it is most important to leave the defendant free to present his own. In assuming the reverse, the judge erred.

The judge's other reason for ruling in favor of admissibility was simply fallacious. It was that the government has rights. Whether it had the right to introduce Moore's prior offense was the question to be decided, and its decision could not be furthered by assuming the answer.

24/ There the Court noted (127 U.S.App. D.C. at 348, 383 F.2d at 941):

> the case had narrowed to the credibility of two persons--the accused and his accuser--and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed.

Because the judge misapplied the criterion of the Luck and Gordon cases, there must be a new trial.

Conclusion

For the reasons stated, the judgment below should be reversed and the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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February 22, 1971

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,798

UNITED STATES OF AMERICA, *Appellee,*

v.

JOHN MOORE, A/K/A GEORGE H. GREEN, *Appellant.*

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
RICHARD A. HIBEY,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

Cr. No. 631-69

INDEX

TABLE OF CASES

OTHER REFERENCES

• Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the search of the automobile was conducted in violation of appellant's Fourth Amendment rights?

2. (a) Whether there was probable cause to arrest appellant?

   (b) Whether the trial court properly admitted the on-the-scene identification of appellant?

3. Whether the trial court erred in ruling that appellant could be impeached by his prior conviction?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,798

UNITED STATES OF AMERICA, *Appellee,*

v.

JOHN MOORE, A/K/A GEORGE H. GREEN, *Appellant.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a five-count indictment filed April 28, 1969, appellant was charged with armed robbery (22 D.C. Code § 3202), robbery (22 D.C. Code § 2901), carrying a pistol without a license (22 D.C. Code § 3204), and two counts of assault with a dangerous weapon (22 D.C. Code § 502).[1] Trial was held on September 15 and 16, 1969, before the Honorable John J. Sirica, sitting with a jury, and appellant was found guilty on counts one, three and four. On November 7, 1969, appellant was sentenced to be imprisoned for five to fifteen years for armed robbery, three to nine years for assault with a deadly weapon, and one year for carrying a pistol

[1] One of the assault counts (count four) was dismissed upon motion by the government because the complaining witness as to that count, Rose Felder, could not be located at the time of trial (Tr. 5, 28-29).

without a license, the terms to run concurrently. However, on November 13, 1969, the trial court reduced the sentences so that appellant would serve four to twelve years for armed robbery, two to eight years for assault with a deadly weapon, and one year for carrying a pistol without a license. This appeal followed.

Mr. Charles Yates was a clerk for the High's Dairy store in the Fairfax Village Shopping Center on February 23, 1969. The shopping center is located in the 3000 block of Alabama Avenue, Southeast (Tr. 4). At approximately 10:30 or 10:35 p.m. on that date, Mr. Yates observed a light-colored, Chrysler-product automobile (Tr. 5, 9-10, 12) pull into the parking lot in front of the store, about twenty yards from where Mr. Yates and Miss Rose Felder, the other clerk, were standing (Tr. 5, 10).[2] A few minutes later the automobile pulled out of the lot and went west on Alabama Avenue toward Pennsylvania Avenue (Tr. 5, 12-13). About three minutes (Tr. 11) after the car left the parking lot, a man, identified at trial as appellant (Tr. 6), wearing blue-tinted sunglasses and a light trench coat and having a large bush haircut (Tr. 20), knocked at the front door of the store, which was locked (Tr. 5-8, 11, 13-14). After a brief conversation concerning the purchase of cigarettes, Mr. Yates opened the door and let appellant enter the store. As Yates was getting the cigarettes, appellant produced a loaded gun (Tr. 8-9, 17-18) and ordered Yates to give him all the money in the register (Tr. 5). Mr. Yates filled a bag that appellant gave to him with all the money in the register and then was directed, along with Miss Felder, to go to a room in the rear of the store (Tr. 5-6). After hearing the intruder run out of the store, Mr. Yates rushed to the front door and was told by an unidentified boy that the robber had run in the direction of Alabama Avenue. Mr. Yates then called the police (Tr. 6, 15-19).[3] In less than a minute

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[2] When the car first pulled into the lot, it came within seven feet from Mr. Yates as it passed by the front of the store (Tr. 12).

[3] Mr. Yates testified that the robber was in the store for approximately six or seven minutes (Tr. 15).

officers from the Metropolitan Police responded to the scene, and Mr. Yates gave them a description of the robber (Tr. 19).

Officer Robert Ballard of the Metropolitan Police was assigned that night to a scout car and was patrolling on Alabama Avenue (Tr. 31). At approximately 10:35 or 10:40 p.m. he observed a man running from the Fairfax Village Shopping Center (Tr. 31). The man was about ten feet from the High's Dairy store running toward Alabama Avenue when the officer first saw him (Tr. 32). He was wearing a brown trench coat and had a bush haircut (Tr. 33). The officer saw the man get into the driver's side of a blue 1960 or 1961 Dodge or Chrysler, which was parked at the corner of 38th Street and Alabama Avenue (Tr. 31-33). The car sped away, going west on Pennsylvania Avenue (Tr. 32). Ballard received the report of the robbery over the police radio, called in the description of the automobile and the fleeing man, and immediately went to the High's store (Tr. 31-33).[4]

Mr. Joseph Cameron was traveling west on Pennsylvania Avenue at about the same time. When his car was between Branch Avenue and the Sousa Bridge, he saw a light blue car spin out of control and go up on the sidewalk. Two men alighted from the disabled vehicle and ran up 33rd Street. Mr. Cameron noticed that the man who got out of the driver's side was a Negro male wearing a raincoat (Tr. 41-43).

Officer Joseph Maddox was at that time proceeding south on Branch Avenue. When he came to the intersection of Pennsylvania and Branch Avenues, he saw a car pull sharply to the curb (Tr. 47). After speaking with Mr. Cameron, the officer went up 33rd Street and eventually back to Pennsylvania Avenue, winding up at the Hot Shoppes Restaurant at 3250 Pennsylvania Avenue (Tr.

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[4] The officer testified that the car was parked thirty to fifty feet from the High's store (Tr. 36) and that the running man passed within twenty to thirty feet of the officer himself (Tr. 36-40).

48).[5] He had received the previously mentioned description of the fleeing men over the police radio and saw a man in the restaurant who "partially" matched the broadcast description. Officer Maddox went to the rear of the restaurant and spoke with the manager, then went out the rear door. As he came around front, he saw the man running across Pennsylvania Avenue. Maddox also saw another scout car half a block away and radioed to it to stop the man running in the parking lot of an Esso station at Pennsylvania and Branch Avenues (Tr. 48-55). Officer Daniel Simmons arrested appellant in the Esso parking lot (Tr. 55-57). Officer Alfred Jackson recovered a tan trench coat from the lavatory of the Hot Shoppe (Tr. 63). Officer Robert Kanjian recovered a pair of sunglasses and a bag containing $51.34 when he searched a 1961 blue Chrysler between 10:30 and 11:00 p.m. (Tr. 64-65).[6]

Officer Simmons, the arresting officer, took appellant back to the scene, where Mr. Yates identified him as the robber (Tr. 21-28, 57). Appellant was returned to the High's store within twelve to fourteen minutes after the robbery (Tr. 27).[7]

The prosecutor informed the court that appellant had pleaded guilty to impersonating the owner of a federal check (18 U.S.C. § 914) on March 7, 1969 (Tr. 72, 90). A hearing was held out of the presence of the jury, and appellant related to the court what his story would be if he decided to take the stand (Tr. 73-92). At the conclusion of appellant's testimony, the trial court decided to permit ap-

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[5] Officer Maddox testified that between five and ten minutes elapsed from the time he observed the car pull to the curb until he arrived at the Hot Shoppe (Tr. 51).

[6] Officer Kanjian had radioed in for information as to the ownership of the automobile. The information radioed back was that the owner was Irene Kelley (Tr. 66). Irene Kelley is appellant's mother (Tr. 66). It is unclear from the record whether Kanjian knew of the familial relationship at the time of the search (Tr. 66-67). Evidence of ownership of the car was not presented to the jury. See Tr. 66-68.

[7] At the time of the identification appellant was not wearing sun-glasses or a trench coat, and Mr. Yates had not yet been informed that they had been seized (Tr. 21-27).

pellant to be impeached by his prior conviction (Tr. 92-94). Appellant then decided not to testify in his own behalf and presented no evidence (Tr. 97-98).

ARGUMENT

I. The search of the automobile was not a violation of appellant's Fourth Amendment rights.

(Tr. 5-12, 31-33, 41-43, 61-65)

Appellant contends that there was no connection between the testimony of Officer Robert Kanjian, the officer who searched the 1961 light blue Chrysler and found the sunglasses and the bag of money, and the testimony of the other witnesses, and that therefore Kanjian's testimony should have been excluded. No such contention, however, was made in the trial court. There was no motion to suppress filed prior to trial (Tr. 70-72), nor any request by appellant to take testimony out of the presence of the jury at the start of the trial or during trial regarding the search of the car (Tr. 70). Also, there was no objection by appellant when the government moved the sunglasses and bag of money into evidence (Tr. 68-69). For this reason alone his present challenge to the admissibility of that evidence should be rejected. *Segurola* v. *United States,* 275 U.S. 106 (1927); *Scott* v. *United States,* 115 U.S. App. D.C. 208, 317 F.2d 908 (1963).

In any event his argument has no merit. Officer Kanjian was the last government witness. It had been established by four prior witnesses that a light-colored, Chrysler-product automobile had been near the scene of the robbery (Tr. 5-12); that appellant had jumped into the driver's side of a blue 1960 or 1961 Dodge or Chrysler and driven from the scene (Tr. 31-33); that a light blue car went out of control near the intersection of Branch and Pennsylvania Avenues and came to rest on the sidewalk (Tr. 41-43); that two men abandoned the car and hurriedly ran up 33rd Street (Tr. 41-43). All of this occurred between 10:30 and 11:00 p.m. on February 23, 1969 (Tr. 5-12, 31-33, 41-43). Officer

Kanjian testified that he searched a 1961 blue Chrysler on February 23, 1969, between the hours of 10:30 and 11:00 p.m. (Tr. 61-65).

We submit that it is clear from the testimony that Officer Kanjian was referring to the automobile used in the robbery. We further submit that the search, which occurred between 10:30 and 11:00 p.m., was a proper one. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *United States* v. *Free*, —— U.S. App. D.C. ——, 437 F.2d 631 (1970); *see Carroll* v. *United States*, 267 U.S. 132 (1925).

II. There was probable cause to arrest appellant, and the trial court properly admitted the identification of appellant by Mr. Yates.

(Tr. 47-57)

The arresting officer, Officer Simmons, was approaching the Hot Shoppe when Officer Maddox told him to stop the man running through the Esso station parking lot (Tr. 55-57). Officer Simmons immediately saw the man and arrested him (Tr. 56-57). Officer Simmons knew that a robbery had occurred at the High's store at Alabama and Pennsylvania Avenues a few minutes before (Tr. 56), and he had received over the police radio a description of the robber which matched that of the man he saw running (Tr. 59-60). Officer Maddox knew that a robbery had just occurred (Tr. 47); received a description of the robber and a description of the getaway car (Tr. 47); saw a car pull sharply to the curb and go up on the sidewalk (Tr. 47, 50); spoke with Mr. Cameron, who saw the two occupants run from the car (Tr. 47, 50); searched the immediate area and five minutes later saw a man partially matching the broadcast description standing in the Hot Shoppes Restaurant on Pennsylvania Avenue (Tr. 48, 51-55); observed the man run from the Hot Shoppe after the man noticed the police officer (Tr. 48, 51-55); and radioed Officer Simmons to arrest the man running in the Esso station parking lot. We submit that there was probable cause for the arrest of

appellant by Officer Simmons. *Carroll* v. *United States, supra; Coleman* v. *United States,* 137 U.S. App. D.C. 48, 420 F.2d 616 (1969); *Bailey* v. *United States,* 128 U.S. App. D.C. 354, 389 F.2d 305 (1967); *Bell* v. *United States,* 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied,* 358 U.S. 885, (1958); *cf. Smith* v. *United States,* 123 U.S. App. D.C. 202, 358 F.2d 833 (1966).

Appellant was returned to the scene by Officer Simmons (Tr. 58-62), and there Mr. Yates and Miss Felder positively identified appellant as the robber (Tr. 27-29). This identification took place twelve to fourteen minutes after the robbery (Tr. 27). Appellant was not wearing sunglasses or a trench coat at the time, and Mr. Yates had not yet been informed that these items had been recovered (Tr. 26-28).[8] Obviously, there was an extremely prompt[9] and fair[10] identification, and we submit that it was proper and was readily admissible.

III. The trial court did not err in ruling that appellant could be impeached by his prior conviction if he took the stand.

(Tr. 72-98)

Appellant was convicted in 1969 (Tr. 85, 90) of impersonating the owner of a federal check (18 U.S.C. § 914) (Tr. 72). He argues that the trial court should have denied the government's request to use this prior conviction for

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[8] Mr. Yates had been shown two or three other men whom he could not identify prior to appellant's being brought back to the scene (Tr. 21-24). There were six or seven police officers at the High's store at the time of the identification (Tr. 58), and it is unclear from the record whether or not appellant was handcuffed (Tr. 23, 58).

[9] *United States* v. *Washington,* D.C. Cir. No. 23,059, decided December 28, 1970, *Stewart* v. *United States,* 135 U.S. App. D.C. 274, 418 F.2d 1110; (1969); *Russell* v. *United States,* 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied,* 395 U.S. 918 (1969); *Young* v. *United States,* 132 U.S. App. D.C. 257, 407 F.2d 720 (1969); *Bates* v. *United States,* 132 U.S. App. D.C. 36, 405 F.2d 1104 (1968).

[10] *Russell* v. *United States, supra* note 9; *Wise* v. *United States,* 127 U.S. App. D.C. 279, 383F.2d 206 (1967), *cert. denied,* 390 U.S. 964 (1968); *see Stovall* v. *Denno,* 388 U.S. 293 (1967).

impeachment purposes. The trial court explicitly followed the guidelines laid down in *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), *cert. denied*, 390 U.S. 1029 (1968). A *Luck*[11] hearing was held outside the presence of the jury (Tr. 74-92), at which appellant took the stand and related what his story would be if he testified before the jury (Tr. 74-80). He was cross-examined by the prosecutor and answered questions asked by the Court (Tr. 80-92). At the conclusion of appellant's testimony, the trial court read to appellant's counsel the rule stated by the Court in *Gordon, supra* (Tr. 92-94).[12] The court then exercised its discretion and ruled that the government could impeach appellant with the prior conviction. Besides the *Gordon* rationale, the court referred to the strength of the government's case as another reason for allowing the impeachment (Tr. 94). *See United States* v. *Horton*, D.C. Cir. No. 23,641, decided March 12, 1971.[13] We submit that the trial court carefully considered the issue of impeachment by prior conviction in the manner prescribed in *Gordon, supra*, and properly exercised its discretion when it chose to allow the government to impeach appellant with his 1969 conviction. Furthermore, even if there was error, it was clearly harmless, given the evidence against appellant. *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *see Horton, supra.*

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[11] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

[12] The prior conviction was for a crime which related to the honesty and integrity of appellant (Tr. 92-93). The conviction took place in the same year as the crime in the instant case (Tr. 93) and was for a crime much different from that for which appellant was on trial (Tr. 93).

[13] In *Weaver* v. *United States*, 133 U.S. App. D.C. 66, 408 F.2d 1269, *cert. denied*, 395 U.S. 927 (1969), this Court declined to find reversible error in a *Luck* ruling where neither the defendant nor anyone else testified on his behalf. The charge in *Weaver* was robbery, and the trial court determined that the defendant could be impeached with a five-year-old prior robbery conviction. There was no *Luck* hearing outside the presence of the jury as suggested in *Gordon, supra.*

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,798

UNITED STATES OF AMERICA, Appellee,

v.

JOHN MOORE, Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

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April 28, 1971

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,798

UNITED STATES OF AMERICA, Appellee,

v.

JOHN MOORE, Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

Our opening brief points out that Moore's arrest resulted from a "drag net" or "roundup" of "suspects", evidently on the basis of a police radio broadcast of a description of the robber given by the victim. That the description available to the police was too vague to enable them to identify anyone as the culprit is proved conclusively by their resort to such a roundup, all those rounded up then being paraded before the victim, who singled out Moore. Such police behavior, one of the very things at which the Fourth Amendment was aimed, and one which this Court has discountenanced, distinguishes this case from all those cited by the government (typewritten brief at 6-7) for the proposition

that Moore's arrest was lawful. In none of them was there a roundup of several persons who might fit a broad, general description of a supposed felon.

Because their conduct in this case conclusively proves that the description available to the police was inadequate, the Court need not involve itself in the difficult question of reconstructing after the event what degree of descriptive detail would have been necessary to constitute probable cause to single out Moore for an arrest. Since, however, the government asserts (typewritten brief at 6) that the arresting policeman, Simmons, "had received over the police radio a description of the robber which matched that of" Moore, it is interesting to compare the government's assertion with the portions of the record on which it relies. Simmons testified (on cross-examination) (59-60):

A. I received over the radio a description of the subject.
Q. And that was for a Negro male with a bush haircut?
A. Negro male, bush haircut.
Q. Tan trench coat?
A. That is correct.
Q. Sun glasses on?
A. That is correct.
Q. When you arrested Mr. Moore he did not have a tan trench coat on?
A. No sir.
Q. No sun glasses?
A. No sir.
Q. No description of pants or shoes given?
A. Not that I recall.
Q. No description of distinctive scars?
A. I don't think so.
Q. Whether he had a mustache or beard?
A. No sir.
Q. Whether he had long sideburns?
A. Not that I remember.

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,798

UNITED STATES OF AMERICA, Appellee,

v.

JOHN MOORE, Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

Our opening brief points out that Moore's arrest resulted from a "drag net" or "roundup" of "suspects", evidently on the basis of a police radio broadcast of a description of the robber given by the victim. That the description available to the police was too vague to enable them to identify anyone as the culprit is proved conclusively by their resort to such a roundup, all those rounded up then being paraded before the victim, who singled out Moore. Such police behavior, one of the very things at which the Fourth Amendment was aimed, and one which this Court has discountenanced, distinguishes this case from all those cited by the government (typewritten brief at 6-7) for the proposition

that Moore's arrest was lawful. In none of them was there a roundup of several persons who might fit a broad, general description of a supposed felon.

Because their conduct in this case conclusively proves that the description available to the police was inadequate, the Court need not involve itself in the difficult question of reconstructing after the event what degree of descriptive detail would have been necessary to constitute probable cause to single out Moore for an arrest. Since, however, the government asserts (typewritten brief at 6) that the arresting policeman, Simmons, "had received over the police radio a description of the robber which matched that of" Moore, it is interesting to compare the government's assertion with the portions of the record on which it relies. Simmons testified (on cross-examination) (59-60):

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Thus, the description received by Officer Simmons which the government says "matched" that of Moore was a description of a Negro male with a bush haircut, a tan trench coat, and sun glasses. When arrested Moore had neither a trench coat nor sun glasses; even assuming for the argument that he was a Negro male with a bush haircut, nevertheless if that afforded Simmons probable cause to arrest Moore, it also afforded him probable cause to arrest perhaps 50,000 other men for the same crime.[1/]

Conclusion

For the reasons stated the judgment below should be reversed and the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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(Appointed by this Court)

April 28, 1971

1/ In fact, Simmons happened by as Officer Maddox, who was watching Moore leave the "Hot Shoppe," was trying to approach Moore; and at Maddox's request, Simmons made the arrest. There is no reason to suppose that Simmons would have arrested Moore but for Maddox's request. Maddox was acting on a somewhat fuller--but still broad and vague--description of the robber, a description that, according to Maddox, Moore matched "partially" (48). That is a way of saying that he did not match it.

Certificate of Service

I certify that I have delivered two copies of the foregoing brief to Thomas A. Flannery, Esquire, the United States Attorney. 28th day of April, 1971.

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